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TABLE OF AUTHORITIES CITED.

In the Supreme Court of the United States.

OCTOBER TERM, 1911.

THE ATCHISON, TOPEKA & SANTA FE Railway Company, plaintiff in error, *v.* THE UNITED STATES. } No. 716.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF KANSAS.

BRIEF FOR THE UNITED STATES.

STATEMENT.

This case was heard by the Circuit Court of the United States for the District of Kansas. The court, upon the evidence, made specific findings of fact set forth on pages 27 to 32, inclusive, of the record, and, upon the facts so found, concluded that the plaintiff was not entitled to recover in the action and that judgment must go for the defendants. (Rec., p. 33.)

For a period of four years next prior to and including June 30, 1907, in pursuance of a contract between the plaintiff and the United States made in accordance with the provisions of the Postal Laws and Reg-

ulations, the plaintiff had transported the United States mails between the city of Chicago, Ill., and the city of Kansas City, Mo., over its line of railroad, known as railroad mail route No. 135098. The compensation for the service of transporting the mails under this contract had been fixed in the manner provided by law, and did not vary during the four years. In addition to this compensation allowed plaintiff for transporting the mails an additional compensation was allowed for furnishing and operating railway post-office cars over the route which was stated in an order of September 23, 1903, and was thereafter many times during said period of four years changed on account of additional authorizations of lines, discontinuances of lines, and additional authorizations of lines of cars of greater length in lieu of cars theretofore authorized, and in each instance the maximum rate of pay prescribed by act of Congress for the space authorized in the cars was allowed and paid. A line of railway post-office cars consists of sufficient cars of the dimensions named to make a round trip over the entire route in 24 hours in the service of carrying the mails for distribution en route. (Rec., p. 27.)

It is the duty of the Postmaster General to readjust the compensation paid for transporting the mails over railroad postal routes and make new contracts with railroad companies for the performance of such service at least once in every four years. (Rec., p. 27.) The compensation to be paid for such service is determined by two factors—the distance the

mails are carried and the average daily weight carried over the entire line. In arriving at the basis for computing the compensation to be paid a railway company for the service of transporting the mails the average daily weight of mail carried by the railway is ascertained by the Government by an actual weighing of the mails and what is known as a distance circular is prepared and signed by the railway company, stating the length of the line, the distance between stations thereon, etc. (Rec., p. 28.) In addition to the compensation paid for the actual transportation of the mails, where the same are carried in cars for distribution purposes 40 feet in length or more, compensation is allowed for the space occupied in such cars as fixed by law and as such space is designated to be used by the Postmaster General by his orders. (Rec., p. 28.)

The new contract term for the service on the route mentioned began July 1, 1907. The service theretofore performed by the plaintiff continued thereafter under the provisions of the Postal Laws and Regulations, subject, with reference to the rate of compensation to be fixed and paid for transportation under the provisions of Revised Statutes, section 4002, and amending acts, to the order of the Postmaster General to be thereafter made, readjusting such pay, as provided by said acts, based upon the average daily weight of mails carried as ascertained by a weighing of the mails upon said route as provided by law; and subject with respect to the rate of pay to be allowed for railway post-office car service,

to the order of the Postmaster General stating the specific allowance to be made in accordance with the provisions of Revised Statutes, section 4004, as amended by the act of March 2, 1907. (Rec., p. 28.)

As the contract between the plaintiff and defendants for the transportation of the mails over the route in question, unless changed, would terminate June 30, 1907, the Postmaster General, in compliance with his duty to readjust the compensation to be thereafter paid and to make a new contract in reference thereto notified, the plaintiff of the date when the mails would be weighed for the purpose of fixing a basis of such compensation. In February, 1907, the Second Assistant Postmaster General sent to the plaintiff the usual distance circular of the department with request to fill in the blanks with the data required pertaining to the postal route. The distance circular contained printed thereon an agreement clause to the effect that the company agrees to accept and perform the mail service upon the conditions prescribed by law and the regulations of the department applicable to railroad-mail service. In completing the distance circular the plaintiff added to this agreement clause by typewriting an exception to certain orders of the department, after which it was signed by the plaintiff and returned July 22, 1907, reaching the department July 24, 1907. Accompanying the transmission of this circular the president of the plaintiff company addressed to the Postmaster General a letter under date of July 1, 1907, containing various protests and the reasons for exe-

cuting the agreement. The protests material to this controversy were against furnishing space and facilities for distributions of mails on trains and for traveling post-office purposes without space pay therefor. The letter further stated that it constituted an exception to any future orders or regulations which in the opinion of the company might be unjust or which might unfairly reduce the compensation for its services. (Rec., pp. 28 and 29.)

Under date of October 3, 1907, the Second Assistant Postmaster General acknowledged the receipt of the distant circular and the letter above referred to, and replied, noting the exceptions of the plaintiff and stating with reference thereto that the department would not enter into any contract with any railroad company by which it might be excepted from the operation or effect of any postal law or regulation, and that it must be understood that in the performance of service from the beginning of the contract term, July 1, 1907, and during the continuance of such performance of service the company would be subject as in the past to all the postal laws and regulations which were then or might become applicable during the term of the service. (Rec., p. 29.)

The plaintiff continued to perform service on and after July 1, 1907, and on July 18, 1907, was operating over the mail route railway post-office cars 60 feet in length, sufficient to constitute three full lines, such lines having been duly authorized theretofore. On that date, however, the Postmaster General made an order changing the authorization of space for

which additional payment could be made, the effect of which was that from July 23, 1907, three half lines of railway postal office cars 50 feet in length, inside measurement, were authorized to supersede three half lines of such cars 60 feet in length over the route. This left the authorized space in such cars westbound at 60 feet to the car, and in cars eastbound at 50 feet to the car. The company was duly notified of such restatement of authorized space, and, on receipt of the notice, objected to the change in authorization and reduction of pay. The department replied, under date of July 25, 1907, that the order was made in accordance with reports showing that no greater space than that authorized was needed for postal requirements in the cars in question. By letter of July 29, 1907, the plaintiff further questioned the reason for reduction in pay below the maximum rate fixed by law, and, by letter of August 3, 1907, the department replied, stating that the order in question was made strictly in accordance with the practice with reference to the authorization of railway post-office car space. By letter of August 3, 1907, the plaintiff protested against the effect of the order in question, and the department, by letter of August 19, 1907, replied, reaffirming its position and stating that there was nothing to be added "except to make it clear that the department can not under any circumstances pay for more space than authorized by the regular orders." During all this time, and subsequent to the receipt of the notification from the department last above referred to, the plaintiff con-

tinued to operate the cars and carry the mails and the clerks therein. (Rec., pp. 29 and 30.)

The weighing provided by law having been made, the department, on November 20, 1907, in accordance with the weights of mails as ascertained by the department and the distance as stated in the distance circular returned by the plaintiff, notified plaintiff of the compensation fixed for transporting the mails, and for the space require and authorized in railway post-office cars under the order of July 18 until the same should be readjusted. (Rec., p. 30.)

By letter of December 2, 1907, the plaintiff acknowledged receipt of the copy of the adjustment order and protested against the half lines of railway post-office cars and the rate fixed therefor. To this the Second Assistant Postmaster General, by letter of December 14, 1907, replied calling attention to his previous letter upon the subject and advising the plaintiff that the department could not pay more for the performance of service than the rates of compensation named in the orders adjusting the pay and in accordance with the orders authorizing railway post-office car space; and in reply to a further statement of plaintiff as to its reservation of right to claim pay for additional facilities, further statement of the Second Assistant Postmaster General was made to the effect that the rate of compensation for railway post-office cars is fixed upon the authorization of space, such authorization being in accordance with the practice of the department and the needs of the postal service, and that the department will not

pay any additional compensation for any other weights of mails or facilities claimed to be furnished by the company, except as duly ascertained and authorized by the department, and that the continuance of the performance of service upon the route must be with this understanding. The plaintiff replied on March 27, 1908, that the statements of the Second Assistant Postmaster General would not be accepted as a legal denial of any consistent right or claim the company may properly present. (Rec., p. 31.)

Upon the receipt of the warrant for the September, 1907, quarter the Washington attorneys for the plaintiff stated that it was accepted under protest, to which the Second Assistant Postmaster General replied that notwithstanding the protest any service performed by the company must be with the distinct understanding that the amount named in the readjusting order is all that can be paid for the service. (Rec., pp. 31 and 32.)

During all the time the plaintiff continued to perform the service of transporting the mails and furnishing railway post office car space, and it has received compensation for such space in compliance with the order of the Postmaster General of July 18, 1907, and plaintiff has at all times protested against the authority of the Postmaster General to make such order. (Rec., p. 32.)

The plaintiff in the construction of its line of railway from the city of Kansas City, in the State of Missouri, to the city of Chicago, in the State of

Illinois, was not aided by any grant of land or other property made thereto by the defendants. (Rec., p. 32.)

ARGUMENT.

The foregoing statement is in accordance with the findings of fact or special verdict filed by the court and set forth on pages 27 to 32, inclusive, of the record. Upon these facts the court reached a conclusion of law that the plaintiff's line of railway between the city of Kansas City, in the State of Missouri, and the city of Chicago, in the State of Illinois, was not constructed in whole or in part by any grant of land or any other property made by Congress on the condition that the mails should be transported over the same at such price as Congress should by law direct, and that the plaintiff is not entitled to recover in the action, and judgment must go for the defendants. (Rec., p. 33.) The last conclusion is assigned by the plaintiff as error. Other assignments are also made, but none of them can properly be brought before this court.

Analysis of argument for plaintiff in error.

The first main proposition submitted by the plaintiff in error is that the parties were agreed upon the value of 60-foot railway post office car lines as the maximum rate prescribed by Congress, and that as such car lines were in fact used by the Government it must be held to have agreed to pay that value.

This proposition assumes and alleges facts which were not found by the court below and therefore can not be considered here. There is nothing in the findings of fact to the effect that it was agreed between the parties that the value of 60-foot postal car lines was the maximum rate prescribed by the statute. The issues presented here are wholly issues of law arising upon the facts as found by the court below and admitted, if at all, in the pleadings, and no question can be raised here, nor was such raised by assignment of error, as to the existence of this alleged fact which the court did not include in its findings and which is not admitted in the pleadings.

All argument, therefore, submitted by plaintiff in error to show that the maximum rate fixed by the statute for pay for a full line of railway post-office cars is the value of the service rendered by plaintiff in error is irrelevant. The cases cited in support of plaintiff's contention may therefore be dismissed from consideration in this court. They would be relevant only in a consideration by the trial court of the question as to what is the value of the service rendered, in the absence of some specific and direct evidence thereon.

The second main proposition of the plaintiff in error is that the half-line railway post-office cars order complained of was made without authority was evidently contrary to the law, and was oppressive and unreasonable. This contention of the plaintiff in error is fully and specificially answered in the argument presented hereinafter in behalf of the de-

fendants in error. However, it is desired to note the fact here that the cases cited to support the theory that the order was in effect a change in the law are not in point.

These cases of *Morrill* v. *Jones* (106 U. S., 466), *Bruhl* v. *Wilson* (123 Fed., 957), and *Hoover* v. *Salling* (110 Fed., 43) are all cases where some department of the Government attempted by an order or direction to limit or curtail some right guaranteed by a law of Congress to the whole people. For instance, in the first-mentioned case the statute provided that animals specially imported for breeding purposes are not subject to duty. The Secretary of the Treasury issued a regulation that before admitting such animals free the collector "shall be satisfied they are of superior stock, adapted to improving the breed in the United States." The Supreme Court held that the Secretary could not by his regulation alter or amend a revenue law. The statute clearly includes animals of all classes. The regulation sought to confine its operation to animals of "superior stock." This was manifestly an attempt to put into the body of the statute a limitation which Congress did not think it necessary to prescribe. The other cases are similar in principle.

The case at bar is clearly distinguished from this class of cases. Congress had provided that additional pay may be allowed for every line comprising a daily trip each way of railway post-office cars at a rate not exceeding certain rates named in such statute for cars of certain lengths. This statute does

not guarantee to railroad companies an absolute allowance for such cars nor an allowance of the maximum rates fixed by law in case such cars are authorized. As will be shown hereinafter, the law is merely permissive and fixes maximum rates, allowing the Postmaster General full power and discretion to fix minimum rates for such space as he may authorize, in accordance with the actual needs of the service.

On the merits of the case the whole theory of the plaintiff in error is that the railroad company was in a position to dictate to the United States the terms upon which the mail service should be performed by it, and in support of the theory claims that during the controversy as to the terms of the contract the company furnished a 60-foot car, which was accepted and used by the department, thus practically waiving or abandoning the order regarding half-car lines, and that if the United States did not wish to use the 60-foot car for the return trip it was for the Government to decline to accept or to refuse to use such a car for the round trip.

This theory is the reverse of the sound principle which must govern the subject of the conduct of the mails by the United States and the doctrine as laid down by the courts with respect to the same. In passing it should be noted that the claim that the department "accepted" the 60-foot cars in the sense that plaintiff in error evidently intends its brief to be understood, is not correct. There is nothing in the findings of fact to justify such statement, but quite the opposite. Finding 5 (Rec., p. 28) is to the effect

that in addition to the compensation paid for actual transportation of the mails where the same are carried in cars 40 feet in length and more, compensation is allowed for the *space* occupied in such cars as fixed by law and as such *space* is designated to be used by the Postmaster General by his orders; and in the other findings (Rec., pp. 30 to 32, inclusive) it is repeatedly set out that the department authorized only the space stated in its orders, and stated that it would pay for no other.

In support of the theory that the Government in the conduct of the mail service must accept the terms of the railroad company upon which such service is to be performed the plaintiff in error cites a recent opinion of the Comptroller of the Treasury, which opinion it has set forth in full as an appendix to its brief. The special quotation from this opinion set forth in the brief of plaintiff in error propounds the doctrine that if the Government did not want the company to carry its mails upon the terms offered by the railroad company, it should not have presented them for its carriage by placing them in its charge; and plaintiff in error goes further and states that with even more force it can be contended that if the Government did not wish to use a 60-foot car for the return trip it was for the Government to decline to accept or to refuse to use such a car for the round trip.

This doctrine, as above stated, is the direct reverse of that sound principle which lies at the foundation of the governmental function of the Post Office De-

partment. By specific grant the Constitution has conferred the power upon Congress to establish post offices and post roads, and in the exercise of this power and in the conduct of the postal service the Post Office Department is performing a governmental function. It has complete control of the conduct of the postal service in the exercise of one of the sovereign powers of the people. It alone, through its executive officers, can fix the terms and conditions, subject to the limitations of the acts of Congress, upon which the service shall be conducted, and define the relations of all persons to the United States who are engaged in such service. Such persons or corporations can not dictate to the United States or to their representative, the Post Office Department, the terms and conditions upon which the mail service shall be conducted. Furthermore, a railroad company carrying the mails is not a common carrier with reference to such mails, but sustains a specific relation toward the United States which has been well defined and stated by the Circuit Court of Appeals in the case of *Bankers' Mutual Casualty Company* v. *Minneapolis, St. Paul & S. S. M. Railway Company* (117 Fed., 434). In that case the court say, inter alia:

> It seems clear to us that defendant in error was a public agent of the United States in relation to carrying the mail for the reason that the Constitution of the United States conferred upon it the power to establish post offices and post roads, and it has power so

> granted by the people as one of the sovereign powers to be exercised by the General Government exclusively. By virtue of this grant of power, the United States has always, through its Post Office Department, assumed the exclusive charge of the carriage and delivery of the mail for the benefit of all the people. In doing so, the United States is beyond question engaged in the discharge of a governmental function. All persons or corporations which are engaged in the carriage or delivery of the mail by authority of the United States, conferred by contract or general laws, are but the instruments used by it to discharge this function.

Clearly, the United States is the employer and, like any other employer, has the right to state the terms upon which the employment shall arise. Where the railroad company accepts the terms fixed by the United States, whether by express words or by acquiescence and performance, an agreement is effected upon the terms proffered by the Government, and the railroad company can not be heard to urge a contract with other and different terms of its own making. In the case of the *Texas & Pacific Railway Company* v. *United States* (28 Ct. Cl., 379) the court held that a contract is effected when a railroad company assents to or performs mail transportation upon the terms stated by the Postmaster General. Of like effect is the case of the *Minneapolis & St. Louis Railway Company* v. *United States* (24 Ct. Cl., 350) in which it was held that the orders of the Postmaster

General were offers of the business at the prices therein stated and that the railroad company by taking and carrying the mails accepted their terms.

If the company did not choose to accept the terms of the Postmaster General it had the privilege to decline to perform the service, but it could not, by continuing to perform the service, force its own terms upon the United States.

In further support of its theory the plaintiff in error cites Revised Statutes, section 3999, which provides that if the Postmaster General is unable to contract for carrying the mail on any railroad route at the compensation not exceeding the maximum rates provided or for what he may deem a reasonable or fair compensation he may separate the letter mail from the other mail and contract for their transportation separately by horse express or otherwise, etc. This is a provision of the act of June 2, 1872, and followed a provision in the same act now stated as Revised Statutes, section 3997, authorizing the Postmaster General to arrange the railroad routes into three classes, etc. These provisions, although brought forward in the revision of 1878 of the statutes, were practically superseded by the act of March 3, 1873 (R. S., sec. 4002), and the amending statutes authorizing the readjustment of railroad mail pay on the basis of the average daily weights and upon an entirely new scale of prices. Whatever may be the force of these provisions at this time the section is evidently cited by the plaintiff in error in support of the theory that the railroad company can dictate

the terms for the performance of mail service and that if the Postmaster General does not agree to them Congress has given him the power to make other contracts. The defendants in error on the other hand contend that, although the Postmaster General has power to make other contracts after the terms which he names are effectively rejected by the railroad company, the power resides in him to fix the Government's terms upon which mail carriers shall perform service, as a necessary incident to the exercise of the govenmental function of carrying the mails and that the railroad company may either accept or decline those terms, but that it can not object to the terms and continue to perform the service and thereby impose its own terms upon the United States without their consent.

Argument in support of contention of defendants in error.

The questions presented by the facts found by the lower court are:

1. Was the order of the Postmaster General issued in violation of the terms and conditions of an express contract between the plaintiff and defendants providing for the transportation of mails over the route in question and providing compensation to plaintiff for space occupied by the Government in railway post-office cars for distribution purposes?

2. Did the Postmaster General have the authority to make the order in question allowing for specific space in railway post-office cars for distribution pur-

poses at a rate below the maximum provided by law for full lines of railway post-office cars?

3. Did the actual performance of service after the issuance of the orders complained of, although objected to, but with notice that the department would not pay for any greater space than that authorized, effect an acceptance, the company having the right and privilege of declining to perform service if the terms offered were not satisfactory?

I.

The making of the order by the Postmaster General not a violation of the contractual relations.

NATURE OF THE CONTRACT.

In order to determine whether the rights of the plaintiff were violated by the order of the Postmaster General, it is necessary to consider carefully the relation that existed between the plaintiff and the defendants prior to and at the time of the making of the order in the matter of transporting the mails on the route in question.

In pursuance of the contract between the plaintiff and the defendants, made in accordance with the provisions of the Postal Laws and Regulations, the plaintiff had transported the United States mails between the city of Chicago, Ill., and the city of Kansas City, Mo., over its line of railroad known as mail route No. 135098 during the four years next prior to and including June 30, 1907. The compensation for the service of transporting the mails under this contract

had been fixed in accordance with the provisions of law—that is, Revised Statutes, section 4002, and the amending acts—upon the basis of the average daily weight of mails carried over the whole length of the route. (Rec., p. 27.) The basis of computing the compensation to be paid for transportation was the average daily weight of mails carried, ascertained by an actual weighing of the mails by the Governemnt and the application of the distances certified to by the plaintiff upon its distance circular returned to the department. (Rec., p. 28.) In addition to the compensation allowed the plaintiff based upon the average daily weight of mails carried, an additional compensation was allowed for furnishing and operating railway post-office cars over the route for distribution purposes, which rate of compensation had been stated in an order of September 23, 1903, and which had many times during the four years been changed on account of changes in the service. These changes resulted in authorizations of additional lines, of discontinuances of lines, and of additional authorizations of lines of cars of greater length in lieu of cars theretofore authorized, and for such authorizations compensation was allowed for the space occupied in the cars furnished, as such space was designated to be used by the Postmaster General by his orders. Under such circumstances the plaintiff could operate any size cars it might desire, provided only that such cars contained at least the amount of linear space authorized. A line of railway post-office cars consists of sufficient cars of the dimensions named to make a round trip

over the entire route in 24 hours in the service of carrying mails for distribution en route. (Rec., p. 27.)

Therefore, the contract which existed between the plaintiff and the defendants during the term prior to and including June 30, 1907, was expressed by the orders of the Postmaster General and the statutes and regulations governing the postal service, as in the case of the *Minneapolis & St. Louis Railway Company* v. *The United States* (24 Ct. Cls., 350), where it was stated that the orders of the Postmaster General and the business of carrying the mails are subject to the statutes and regulations of the department which, with the usual and ordinary customs and practices of the department in relation to railroads and mail service, constitute the terms of the contract.

The above-stated relations were those which existed between the plaintiff and the defendants on June 30, 1907, the end of the term for which adjustments had theretofore been made in accordance with the provisions of law. The new contract term for service on the route began the next day, July 1, 1907. The service theretofore performed by the plaintiff continued thereafter under the provisions of the Postal Laws and Regulations and subject, with reference to the rate of compensation to be fixed and paid for, the transportation of the mails under the provisions of Revised Statutes, section 4002, and the amending acts, to the order of the Postmaster General to be thereafter made readjusting

such pay as provided by such acts, based upon the average daily weight of mails carried, to be ascertained by an actual weighing of the mails upon the route as provided for by law; and subject, with respect to the rate of pay to be allowed for railway post-office car service, to the order of the Postmaster General stating the specific allowance to be made in accordance with the provisions of Revised Statutes, section 4004, as amended by the act of March 2, 1907. (Rec., p. 28.)

THE DISTANCE CIRCULAR AND PROCEEDINGS THEREON.

For the purpose of ascertaining, stating, and fixing the pay for the transportation of the mails upon the route in question for the new term beginning July 1, 1907, the Postmaster General, in compliance with his duty to readjust the compensation as provided by law, ordered a weighing of the mails on the route for the purpose of fixing a basis for such compensation, and notified the plaintiff of the date of such weighing, and on February 19, 1907, sent to the plaintiff a copy of the department's distance circular, with request that it be filled out, furnishing the data required respecting the postal route and that it be returned to the department. (Rec., p. 28.)

The distance circular contained a printed clause of agreement thereon, reading as follows:

> The company named below agrees to accept and perform mail service on the conditions prescribed by law and the regulations of the department applicable to railroad mail service.

The plaintiff added, in typewriting, to this printed agreement an exception to certain orders of the Postmaster General, signed the circular under the hand of its president, and transmitted it to the department on July 22, 1907. The circular, so executed, was received at the department on July 24, 1907. Accompanying the circular was a letter containing various protests, among which was one against furnishing space and facilities for distribution of mails on trains and for traveling post office purposes without specific space pay therefor. (Rec., pp. 28 and 29.)

Under date of October 3, 1907, the Second Assistant Postmaster General replied to the letter of protest and to the exception stated on the distance circular, and specifically informed the plaintiff with respect thereto that the department would not enter into any contract with it by which it might be excepted from the operation or effect of any postal law or regulation, and that it must be understood that in the performance of service from the beginning of the contract term, July 1, 1907, and during the continuance of such performance of service, the plaintiff would be subject as in the past to all the postal laws and regulations which were then or might become applicable during the term of the service.

THE ORDER COMPLAINED OF.

While the condition above described was continuing, the service being performed by the plaintiff after the 1st of July, 1907, under the provisions of the Postal Laws and Regulations subject to a restatement

by the Postmaster General as to the rate of compensation to be allowed therefor and before the filing of the distance circular as above stated, the order of which plaintiff complains was made on July 18, 1907. At that time the plaintiff was operating over the route railway post-office cars 60 feet in length sufficient to constitute three full lines in accordance with authorizations made during the preceding term. On that date the Postmaster General made the following order:

> From July 23, 1907, authorize three half lines railway post-office cars 50 feet in length, inside measurement, to supersede three half lines of such cars 60 feet in length over route 135,098, Chicago, Ill., and Kansas City, Mo.

The effect of this order was to reduce to 50 feet the authorized space in railway post-office cars eastbound and to leave the authorized space in such cars westbound at 60 feet to the car. (Rec., pp. 29 and 30.) The reason for and purpose of this order was the same as had been the basis for all previous orders of the Postmaster General authorizing car space on the route in question, namely, to state such authorization in accordance with the exact needs of the service for distribution purposes. (Rec., pp. 30 and 31.) During the preceding term the authorized space had been by order changed from time to time.

CONTRACT RIGHTS NOT VIOLATED.

It will be entirely clear from the above that no contract rights of the plaintiff were violated by the order made by the Postmaster General. After the

30th of June, 1907, and beginning with the new contract term there was no express contract between the parties which defined the terms upon which the service should be performed and paid for. The facts as found by the court are that with the termination on June 30, 1907, of the rates of compensation fixed for the preceding term the plaintiff continued to perform the service for the defendants under the terms of the Postal Laws and Regulations subject, with reference to the rates of compensation, to the orders of the Postmaster General to be thereafter made. As to the compensation for transportation, the rate was to be based upon the average daily weight of mails carried and the statutory rates fixed by law and expressed by the order of the Postmaster General making the readjustment, and as to the compensation for car space subject to the order of the Postmaster General stating the specific space in cars required for the distribution of mails en route and the rate of compensation fixed by him therefor.

With the return of the distance circular by the plaintiff a protest was made by the company against furnishing space and facilities for distribution of mails and for traveling post-office purposes without specific pay therefor. This protest by the plaintiff was wholly ineffectual, as it was met by the Post Office Department with the oft-repeated statement that it would not enter into any contract with the plaintiff whereby it might be excepted from the operation of any postal law or regulation, and that in the performance of service from the beginning of the contract

term and thereafter it must be understood that the plaintiff would be subject to all the postal laws and regulations then or to become applicable during the term, and that the Postmaster General would pay for the service no greater amount than that fixed by his orders. The effect of these protests and the replies of the department, together with the continuance of the service by the plaintiff thereafter, will be further considered hereafter.

The plaintiff contended in the court below that it was aided in the construction of its road by lands granted by the Government, and as a condition of the grant of such lands the plaintiff was obliged to transport the mails for the Government over the route in question, and that it was not free to decline to perform such service. As to this contention the court below has found that upon the facts stated the plaintiff was aided by grants of land in the construction of its line of railway through the State of Kansas from the city of Atchison to the Colorado line, yet the route in question extends from the city of Kansas City, in the State of Missouri, to the city of Chicago, in the State of Illinois; that this last portion of plaintiff's line of railway was constructed long after its Kansas line, and that its construction was not aided by the Government through grants of public lands or otherwise (Rec., p. 24); and upon the authority of the case of *United States* v. *Alabama Great Southern Railroad Company* (142 U. S., 615), affirming the decision of the Court of Claims in the same case in 25 Court of Claims, 30, reaches a conclusion of law that the road

over which the mail route in question was stated is not a land-grant road within the meaning of section 13 of the act of Congress of July 12, 1876. (19 Stat., L., 82.)

The road in question not being a land grant aided railway, the lower court further holds on the authority of the *Eastern Railroad Company* v. *United States* (129 U. S., 391), and *Minneapolis & St. Louis Railway Company* v. *United States* (24 Ct. Cls., 350), that the plaintiff was under no obligation to the Government to carry the mails or furnish the space in cars for railway post office service, but was free to carry the mails or to decline to carry them or to contract with the Government for the performance of such services or to decline to contract.

II.

The Postmaster General had power to make the order complained of authorizing "half car lines" and to subsequently fix the pay for the railway post office car service at a rate below the maximum provided by law for full lines of railway post office cars.

THE STATUTES AND REGULATIONS GOVERNING ALLOWANCE OF RAILWAY POST OFFICE CAR PAY.

At the time the order of July 18, 1907, complained of was made the Postmaster General's authority for making allowances for railway post office car service was found in section 4004, Revised Statutes, as amended by the act of March 2, 1907 (34 Stat. L., 1212), as follows:

> Additional pay may be allowed for every line comprising a daily trip each way of rail-

way post-office cars, at a rate not exceeding $25 per mile per annum for cars 40 feet in length; and $30 per mile per annum for 45-foot cars; and $40 per mile per annum for 50-foot cars; and $50 per mile per annum for 55 to 60 foot cars. (R. S., sec. 4004.)

After July 1, 1907, additional pay allowed for every line comprising a daily trip each way of railway post-office cars shall be at rate not exceeding $25 per mile per annum for cars 40 feet in length; and $27.50 per mile per annum for 45-foot cars; and $32.50 per mile per annum for cars 55 feet or more in length. (Act of Mar. 2, 1907, 34 Stat L., 1212.)

The act of March 3, 1879, section 4 (20 Stat. L., 358) provides:

> All cars or parts of cars used for the Railway Mail Service shall be of such style, length, and character, and furnished in such manner, as shall be required by the Postmaster General, and shall be constructed, fitted up, maintained, heated and lighted, by and at the expense of the companies.

The postal regulation in force at that time defining railway post-office car lines, and relating to space therein which could be paid for, was as follows:

> A line consists of a car or cars sufficient to perform a daily round trip over the whole route, and full pay therefor will only be allowed where such car or cars are accompanied by an employee or employees of the postal service in the discharge of the duties of distributing and handling the mails, as contem-

plated by the use of such cars in the service. (Sec. 1179, par. 3, Postal Laws and Regulations.)

From the above it will be seen that the allowance which may be made within the discretion of the Postmaster General for railway post-office car lines is in addition to the compensation fixed by his order under the provision of Revised Statutes, section 4002, and its amending acts (P. L. & R., sec. 1164, edition of 1902, and supplement of 1907) for the transportation of the mail themselves, and is only authorized when the linear space needed for railway post-office purposes (that is, for the distribution of the mails by the clerks en route) equals 40 feet or more. When such linear space in the car does not equal 40 feet the company is required to furnish apartment space in cars, in which the mails may be distributed, without additional compensation, as one of the conditions upon which its pay for transportation under the act above referred to is fixed. (R. S., sec. 4002.)

It appears further that additional compensation may be allowed for every line of cars, and that a line of cars consists of sufficient number to perform a daily round trip over the whole route. Furthermore, full pay for lines may only be allowed under the Postmaster General's regulations where such car or cars comprising such line are accompanied by an employee or employees engaged in the distribution and handling of the mails, as contemplated by the use of such cars in the service; that is to say, they may be paid for at the

maximum rate only where the maximum space is needed and used for distribution purposes.

In recognition of the principle that, under the statute conferring discretionary power upon the Postmaster General to make an allowance and providing a maximum for such allowance, it is proper for the Postmaster General to authorize and pay for only such space in the cars as is needed and used in the service for the distribution of the mails, there arose in the service a practice known as the authorization of half-car lines. The Second Assistant Postmaster General states, in his annual report for 1908, the origin and nature of these half-car lines as follows:

> From the passage of the law in 1873 allowing additional compensation for railway post-office cars, to the year 1897, authorized half lines of railway post-office cars were unknown in the service. Thereafter a practice gradually arose of making agreements with railroad companies for the authorization and operation of half lines in cases where the postal needs in one direction warranted the authorization of such cars, but in the opposite direction did not. It became the practice to secure an agreement from the railroad company, when practicable, for the authorization and operation of a half line where these conditions arose.
>
> Half lines arose also where, after authorization of a full line of railway post-office cars, the needs of the service in one direction grew faster than those in the opposite direction.

> In such a case it was customary to offer the company pay for additional space in one direction only. If accepted by the company, this converted the full line into two half lines with different rates of pay. It has also been customary to deduct the pay for a car run where the railway postoffice car was returned deadhead—that is, without mail or clerks therein. (Report of Second Assistant Postmaster General, 1908, p. 13.)

THE POWER OF THE POSTMASTER GENERAL TO FIX MINIMUM RATES.

It will be observed that the statute authorizing the Postmaster General to make allowances for railway post-office car service provides that such allowances may be made at "not exceeding" the rates named therein. It is a well-established principle of law, and confirmed by uniform practice of the executive departments that such authority fixes the maximum rate which may be allowed by the executive officer, and confers the discretion upon him to fix a lower or minimum rate for the service. This question has been directly passed upon by the courts in defining the power of the Postmaster General under the law authorizing and directing him to make readjustments of compensation for the transportation of mails by railroads. The language of the statute (R. S., sec. 4002) is the same in this respect as that statute (R. S., sec. 4004) with reference to the authorization of railway post-office car allowances. It provides that the pay per mile per annum shall

"not exceed" the rates named. The Court of Claims, in the case of *Eastern Railway Company* v. *The United States* (20 C. Cls., 23, affirmed in 129 U. S., 391), held that the statute does not establish an absolute rate of compensation, but fixes maximum rates which are not to be exceeded, leaving the Postmaster General the discretion to make contracts at less rates if he should be able to do so. To the same effect are the cases of *Minneapolis & St. Louis Railroad Company* v. *The United States* (24 C. Cls., 350), and *Texas & Pacific Railway Company* v. *The United States* (28 C. Cls., 379).

It is very clear, therefore, that the Postmaster General had the power to fix the rate stated in the orders complained of and that the views on this point are sound, as expressed by the court below in the following language:

> In view of the above statutory provisions conferring large powers on the Postmaster General, it is apparent the maximum rate of compensation therein fixed for the service performed is merely one that can not be exceeded in any contract made by the Post Office Department of the Government with a railway company, and not that such maximum rate may, in the absence of contract to that effect, be demanded by a railway company for the performance of the service. And to this effect are the adjudicated cases.

III.

The orders complained of were an offer which the company could have accepted or rejected. The failure to reject such offer and to refuse to perform the service, and the actual performance of service thereafter, although under objection but with notice that the department would not pay for any greater space than that authorized, was in effect an acceptance.

THE ORDERS WERE OFFERS OF BUSINESS, WHICH WERE, IN EFFECT, ACCEPTED BY FURNISHING THE CARS AND PERFORMING THE SERVICE.

The order of July 18, 1907, and the readjustment order of November 7, 1907, the first authorizing the space in railway post-office cars upon which pay for the same would be based, and the second stating the pay therefor accordingly, were offers by the Postmaster General to the plaintiff company which it was at liberty to accept or reject. They may have been accepted by one of two methods: First, by expressly agreeing to the terms of the orders; and, second, by continuing the performance of service after their issuance and with the knowledge conveyed to plaintiff that the Postmaster General would not vary them. It could refuse by only one means, that of declining to perform the service. A mere objection to the orders, with a continuance of the service, was entirely ineffectual.

There was no express agreement on the part of the company to the terms of the Postmaster General. There was, however, an acceptance of them in effect

by its continued service, although with objection, but in the face of the express and repeated declaration by the department that the terms of the orders would not be modified, that the department would not make any contract with the plaintiff whereby it would be expected from the operation of any postal law or regulation, and that a continuance of such service would be paid for only at the rates named in the orders of the Postmaster General. (Rec., pp. 29, 30, 31, and 32.)

The terms of the department's orders authorizing service could not be changed by the objections of the plaintiff without the acquiescence of the department. The department omitted no opportunity to inform the plaintiff that notwithstanding the objections the terms of the orders authorizing space and pay would not be modified and that if the company performed service it need not expect to receive any greater compensation therefor than that fixed by the orders of the Postmaster General. The court has found as a fact that beginning with the new quadrennial term the service theretofore performed by the plaintiff continued thereafter under the provisions of the Postal Laws and Regulations subject to the fixing of the rate of pay by the Postmaster General in accordance with the law. (Rec., p. 28.) The first act of the Postmaster General thereafter was done on July 18, 1907, by the issuance of an order reducing the authorization of car space in eastbound trains. This was a specific statement of facilities needed in cars

for which the Postmaster General proposed to pay and was to become effective from and after July 23, 1907. (Rec., pp. 29 and 30.) This order was an offer made by the Postmaster General of terms upon which the carrying of the mails in cars should thereafter be paid for. The plaintiff could either accept or reject it. It objected to the change in authorization but continued the service. The department thereafter, on July 25, 1907, replied that the order was made in accordance with reports showing that no greater space than that authorized was needed for postal requirements in the car in question. By letter of July 29, 1907, the plaintiff further questioned the reason for the reduction and this was replied to on August 3, 1907, by the department, stating that the order in question was made strictly in accordance with the practice with reference to the authorization of railway post-office car space. On August 3, 1907, the plaintiff protested against the effect of the order; but the department, by letter of August 19, 1907, replied reaffirming its position and stating that there was nothing to add "except to make it clear that the department can not under any circumstances pay for more space than authorized by the regular orders." During all the time, however, the plaintiff continued to operate the cars and carry the mails and clerks therein. (Rec., p. 30.)

This is the status upon which the claim, if any, must rest, and the question is clearly one whether after the Postmaster General has named the terms upon which a company shall carry the mails, the

plaintiff may, by objecting but by continuing to perform the service, force upon the United States a contract which it declares it will under no circumstances make, and, further, whether such a continuance of service under those circumstances is not a virtual acquiescence in the terms offered by the Postmaster General inasmuch as the plaintiff had the right to refuse to perform service if it so elected.

The situation was not changed by the filing of the distance circular by the plaintiff on July 24, 1907, in which it protested "against furnishing space and facilities for distribution of mails on trains without specific space pay therefor." To understand this protest it must be remembered that the Revised Statutes, section 4004, provides two conditions upon which the transportation pay, based upon the weights of mails carried, may be earned by a carrying company, one of which is that the "mails shall be conveyed with due frequency and speed and that sufficient and suitable room, fixtures, and furniture, in a car or apartment properly lighted and warmed, shall be provided for * * * (railway postal clerks) to accompany and distribute the mails." This requirement is to furnish what are known as apartment cars, for which the railroad company receives no additional specific compensation or pay therefor, being covered by the general transportation pay based on the weights of mails carried. It is only after the space used reaches a requirement of 40 linear feet or more that the specific pay for cars provided for by Revised Statutes, section 4004, and

amending acts, may be allowed. It is clear, therefore, that if this protest meant anything it was leveled against the furnishing of apartment-car space without specific pay therefor. This is confirmed by the fact that at the time the letter in which it occurs was written (July 1, 1907) the order of July 18, reducing car space on the line, had not been made.

Thereafter the Second Assistant Postmaster General, on October 3, 1907, replied specifically to the exceptions and protest accompanying the distance circular and informed the company that the department would not enter into any contract by which it, the company, might be excepted from the operation or effect of any postal law or regulation and that it must be understood that in the performance of service from the beginning of the contract term and during its continuance the company would be subject, as in the past, to all the postal laws and regulations. (Rec., p. 29.) This was another affirmation of the position of the department making the matter entirely clear to the plaintiff that the department would not make a contract upon any terms excepting those which it had named. The plaintiff continued thereafter to carry the mails.

Finally, the department made the readjustment of pay and notified the plaintiff, which again protested against the half lines of railway post-office cars and the rates of pay therefor as stated therein, to which the Second Assistant Postmaster General replied, December 14, 1907, calling attention to previous letter upon the subject and advising the

plaintiff that the department can not pay more for the performance of service than the rates of compensation named in the orders adjusting the pay and in accordance with the orders authorizing railway post-office car space. A further statement by the plaintiff that it reserved the right to claim pay for additional facilities required was met by the Second Assistant Postmaster General, by letter of January 16, 1908, stating that the rate of compensation for cars is fixed upon the authorization of space, such authorization being in accordance with the practice of the department and the needs of the postal service, and further that the department would not pay any additional compensation for any other weights of mails or facilities claimed to be furnished by the company except as duly ascertained and authorized by the department, and that the continuance of service on the route must be with that understanding. The plaintiff's receipt of the pay warrants under protest was likewise replied to that notwithstanding such protest any service performed by the company must be with the distinct understanding that the amount named in the readjusting order is all that can be paid for the service. During all this time the plaintiff continued to perform this service of transporting the mails and furnishing the railway post-office car space. (Rec., pp. 31 and 32.)

It thus appears that the company was at no time left in doubt as to the terms upon which the department offered the business. It may be said that for a

short period after the 1st of July, 1907, the transportation of the mails was conducted under an implied contract according to the provisions of the Postal Laws and Regulations and certain terms to be thereafter named by the Postmaster General. He did name those terms thereafter, which were offers of business to the plaintiff. They were met for a time by objections from the plaintiff which might be considered as counter propositions. These propositions were in each case specifically declined by the Postmaster General, who at all times restated his original offers and insisted that he would make no other contract. The company had the right to accept or reject the Postmaster General's offers. It did not reject them, but during all the time the plaintiff continued to perform the service in transporting the mails and furnishing railway post-office car space and received the compensation for such space as authorized by the orders of the Postmaster General.

It is submitted that this action of the plaintiff constituted an acceptance of the terms offered by the Postmaster General, although the plaintiff made objection to the terms.

This view has been suggested strongly by the courts in postal cases, but the cases heretofore decided have not been exactly in point. It will be well to examine the views of the courts in these cases:

In the case of the *Chicago & Northwestern Railway Company* v. *United States* (15 C. Cls., 232) the judgment of the lower court was reversed in the Supreme Court (104 U. S., 680), but such reversal was upon the

ground that there was a specific time contract which could not be modified without the consent of both parties. The statement of the lower court upon the effect of a protest is instructive in this case:

> No protest could save a right which they did not possess, nor change the terms proffered them for performing if they elected to perform. Having made their election they are bound by it. (P. 245.)

This dictum was made on the theory that the court was dealing with a contract which was subject to an act of Congress and the order of the Postmaster General, and the further theory that the company could elect to continue or discontinue the service. In that respect it was assumed that the case was similar to the one at bar where there was no specific contract for a fixed time between the plaintiff and the Government. If the theory of the lower court had been correct with reference to the nature of the contract it would seem that its dictum with respect to the futility of a protest was correct, and the fact that the Supreme Court reversed the decision of the lower court on the ground that it was mistaken with reference to the character of the contract (that is, there existed a contract which was not subject to the change noted) does not discredit these views expressed by the lower court in the particular urged here.

In the case of the *Eastern Railroad Company* v. *United States* (20 C. Cls., 23) the question involved was whether the Postmaster General could by order

restating the compensation he allowed a railroad company for mail transportation in compliance with the act of Congress reducing compensation, thus lawfully reduce the pay to which the company was entitled where there did not exist any time express contract. The case was one where the service continued into a new quadrennial term following a term in which there was an express and time contract. During the new term the relations existing between the company and the Government were only those prescribed by the statutes and regulations as in the case at bar. Thereafter the Postmaster General made the order reducing the pay 5 per cent provided by law. The court say:

> So in this case it is to be presumed that when the company commenced the transportation of the mails, July 1, 1877, it had been agreed that payment should be made for what was done and nothing more. So long as the Postmaster General furnished the mails and the claimant continued to carry them an implied contract existed, which might be terminated at any time by either party. The implied compensation was the reasonable worth of the service, and that might be measured by the previous dealings of the parties for like service and the statutes regulating the same. The maximum rate fixed by statute would no doubt be considered the reasonable and implied compensation until the Postmaster General should make other terms, with the concurrence, express or implied, of the claimant.

> On the 12th of July, 1878, the Postmaster General ordered a reduction to be made for service after the first of that month of 5 per cent from the rates previously paid, in accordance with an act of Congress passed June 17, 1878 (Supp. to R. S., 359). Immediate notice of this order was given to the claimant and no objection was made to it. This order and notice constituted an offer on the part of the Postmaster General, which the claimant might decline or accept at its pleasure. Having thereafter continued the service for three years and received a reduced compensation without objection, the company must be held to have accepted the offer of the Postmaster General modifying the previously existing implied contract relations between them.

The judgment of the lower court was affirmed by the Supreme Court of the United States in 129 United States, 391, in whose opinion it is stated that the company was under no legal obligation to carry the mails after July 1, 1877, and that after the reduction of 5 per cent was made it was at liberty to discontinue the transportation on its cars.

It is true that in the case cited the company did not protest, but it is clearly stated that the order of the Postmaster General was an offer which the claimant might decline or accept at its pleasure, and it is held that the company accepted it by performing the service without objection. In the case at bar the company objected, but chose to perform the service, although it had the privilege of declining to do so.

This appears to have been in effect an implied concurrence.

In the case of the *Minneapolis & St. Louis Railway Company* v. *United States* (24 C. Cls., 350) the company sued for additional pay for delivering the mails at offices within 80 rods of way stations and to recover deductions made for delayed trains. There was no objection made by the company to the regulations of the department under which the Postmaster General's orders had been made until the suit was brought. The case is cited here to show the view of the court with respect to the nature of the contract.

> The voluntary compliance with the requests contained in the weight and distance circulars sent out by the Postmaster General was an application for the service of carrying the mails by the claimant corporation, and the orders of the Postmaster General were offers of the business at the prices therein stated. Those orders and the business were subject to the provisions of the statutes and the general regulations of the Post Office Department, which the parties were bound to know, as well as the usual and ordinary customs and practices of the department in relation to railroad mail service, with which all persons engaged in that service are presumed to be familiar. All these taken together constitute the terms of the offers, and the claimant, by taking and carrying the mails, accepted those terms. (Pp. 360 and 361.)

In the case of the *Texas & Pacific Railway Company* v. *United States* (28 C. Cls., 379), the company

sued for full pay for a service which had been adjusted by the Post Office Department as "lap service" at a lower rate than the maximum allowed by the statute. There had been a protest which was subsequently withdrawn. The right of the company to continue or discontinue the service and the right of the Postmaster General to fix the terms upon which he would have the service performed or to arrange for the service otherwise if such terms were not agreed to are set forth in the opinion of the court as follows:

> The company was under no obligation to perform this service for any agreed period and could have refused to take the mails at any time. Complaining of the injustice of the contract did not annul it nor make another and different one in its place. If the company had refused to perform the service the Postmaster General might have acceded to the claimant's terms, or he might have discontinued the service and have turned the mails over to the Galveston, Harrisburg & San Antonio Railway Co., but he had a right to the option, just as the claimant had the option to carry the mails on the terms agreed upon or to refuse to carry them at all.
>
> The contract could not be changed by complaints and protests.
>
> It would be a novel principle to introduce into the law of contracts that a contractor for continuous service at agreed prices can raise the price by complaining of the injustice of the contract while still performing the

service and regularly taking pay according to contract price.

But the letter of the company was not a protest such as is admitted to avoid the otherwise legal effect of an act done. It was a mere complaint, terminating with a request for a modification of the order of adjustment.

MERE COMPLAINT UNAVAILING.

The plaintiff's complaints against the orders of the Postmaster General that named the terms upon which the business was offered did not effect a modification of those terms. The most that could be claimed for them is that they constituted counter propositions on the part of the plaintiff. These propositions, however, were specifically declined by the department upon every occasion and the terms offered by the Postmaster General were reaffirmed. It has been said by this court that the department can not force a contract upon a railroad company situated as this company was (*Chicago, Milwaukee & St. Paul Railway Company* v. *United States*, 198 U. S., 389). With more reason it must be said that a railroad company can not force a contract upon the United States. This principle being clearly recognized, the rights of the parties in an issue presented as in this case must be determined by their general rights with respect to the transportation of the mails. The Postmaster General has the undoubted right to order and direct the transportation of the mails on railroad routes. Under the statutes he has the right and power to fix the rates of compensation which may be

paid for the service rendered. These rates may be minimum rates and need not be the maximum rates named in the statutes. He has the right to arrange with one transporting company or with another for the carriage of mails, and if the terms upon which he offers the business are not satisfactory to any one railroad company he has the right of a declination by the company to perform the service and the privilege of making other arrangements if he sees fit to do so. Upon the part of the railroad company, if it has not been Government aided by grant of lands or otherwise, it has the right of declining to accept the terms offered by the Postmaster General, but it has no right or power to fix terms upon which it will carry the mails as against the orders, directions, and judgment of the Postmaster General. It necessarily follows from these considerations that unless the Postmaster General agrees to the modified terms suggested by a railroad company a complaint or protest on its part will give it no right of action to recover from the United States upon the basis of its own proposed terms, and that if it is dissatisfied with the terms offered by the Postmaster General its only recourse is to decline to perform the service.

IV.

Conclusion.

From the foregoing it appears that the orders of the Postmaster General were not issued in violation of the terms and conditions of any contract between the plaintiff and the defendants; that he had authority to

make the orders in question; that such orders were offers by the Postmaster General which the plaintiff could accept or reject; that the plaintiff objected to and complained against the orders, but continued to perform the service, and that the Postmaster General never acceded to any objection of the plaintiff, but on the other hand declined to modify his orders and notified plaintiff that a contract would not be made on any other basis. Furthermore the Postmaster General had the right to fix the terms upon which he would have the mails carried; and the recourse the plaintiff had if not satisfied therewith was to discontinue the service, notwithstanding which the plaintiff continued the service at all times. It is therefore respectfully submitted that the judgment of the Circuit Court should be affirmed.

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